No. 2424

United States

Circuit Court of Appeals

For the Ninth Circuit.

TACOMA RAILWAY & POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

ELLING REMMEN,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filmer Bros. Co. Print. 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

JOHN A. SHACKLEFORD, Esquire, Perkins Building, Tacoma, Washington, and

FRANK D. OAKLEY, Esquire, Perkins Building, Tacoma, Washington,

Attorneys for Plaintiff in Error.

J. F. FITCH, Esquire, #406 Bankers Trust Building, Tacoma, Washington;

B. F. JACOBS, Esquire, #406 Bankers Trust Building, Tacoma, Washington, and

J. M. ARNTSON, Esquire, #406 Bankers Trust Building, Tacoma, Washington,

Attorneys for the Defendant in Error.

In the District Court of the United States, Western District of Washington, Southern Division.

No. 1335.

ELLING REMMEN,

Plaintiff,

vs.

TACOMA RAILWAY & POWER COMPANY, a Corporation,

Defendant.

Stipulation [as to Printing of Record].

It is hereby stipulated by the parties hereto that the Clerk of the Circuit Court of Appeals have printed the following parts only of the record which are deemed material to the hearing of the Writ of Error in this case, to wit:

Complaint;
Answer;
Reply;
Judgment;
Defendant's Requested Instructions;
Petition for New Trial;
Order Overruling Petition for New Trial;
Assignments of Error;
Bill of Exceptions;
Order Settling Bill of Exceptions;
Petition for Writ of Error;
Order Allowing Writ of Error;
Bond on Writ of Error;
Citation;
Writ of Error and this Stipulation. [1*]

That in printing the above portions of the record, the designation of the court, title of the case, verifications, and endorsements may be omitted, except on the first page,—the Court's charge to the jury shall also be printed as part of the record, but if printed as part of the bill of exceptions that is sufficient.

FITCH, JACOBS & ARNTSON,
Attorneys for Plaintiff.
J. A. SHACKLEFORD,
F. D. OAKLEY,
Attorneys for Defendant.

(Filed May 8, 1914.) [2]

Complaint.

Comes now the plaintiff and for cause of action against the defendant, complains and alleges as follows:

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*Page-number appearing at foot of page of original certified Record.

I.

That the defendant is, and was at all of the times hereinafter alleged, a corporation organized under the laws of the State of New Jersey, and doing business in the Western District of Washington, and was and is engaged in the operating of a line of street railway in the City of Tacoma, and particularly a line of street railway running in a northerly and southerly direction on South Yakima Avenue in said city.

II.

That the plaintiff is a resident of the Western District of Washington, residing in the southerly part of the city of Tacoma; and on or about December 7th, 1912, at about six P. M. of said day the plaintiff was travelling southward on said South Yakima Avenue in the City of Tacoma, and upon arriving at about South Sixty-second Street plaintiff undertook to cross from the westerly to the easterly side of said avenue, and while plaintiff was upon said South Yakima Avenue, and in the exercise of due care on his own part, and endeavoring to pass from the westerly to the easterly side thereof, one of the street-cars of the defendant, which was being carelessly and negligently operated in a northerly direction on said South Yakima Avenue, was so carelessly and negligently operated and handled by the employees of the defendant company in charge of the operation of said car that plaintiff was without warning run down, struck and injured by said car.

III.

That by reason of being so struck and run down by said street-car [3] as in paragraph two hereof

alleged, plaintiff was seriously and permanently injured, particularly as follows: Plaintiff suffered an injury to the right leg, and particularly about the right knee joint, and a fracture of the external condyle of the femur, and the internal semilunar cartilage has been fractured and torn away from its attachments to such an extent that it is floating, and acts as a foreign body in the knee-joint, and a severe bruise and sprain of the right shoulder, and a depression of the skull on the right side of the head. By reason of which injuries plaintiff suffered great mental and physical pain and anguish, has been permanently deprived of the use of his right leg, was knocked insensible for a long period of time, and did not recover complete consciousness for a period of about ten days, plaintiff's memory has been seriously impaired by reason of the injury to his head, plaintiff's hearing has been and is seriously impaired, and plaintiff is advised and alleges the fact to be that said injuries are of a serious and permanent nature.

IV.

That plaintiff is of the age of thirty-eight years; that plaintiff is by occupation a longshore and warehouse man, and as such was able to earn and did earn an average wage of twenty-five dollars per week.

V.

That by reason of the injuries by plaintiff received as herein alleged, his earning capacity has been completely cut off and destroyed.

VI.

That by reason of the injuries by plaintiff received as herein alleged, he has been damaged in the sum of ten thousand dollars ($10,000.00). [4]

Wherefore plaintiff prays judgment against the defendant for the sum of ten thousand dollars ($10,000.00), together with his costs and disbursements in this action sustained, to be taxed according to law.

FITCH, JACOBS & ARNTSON,
Attorneys for Plaintiff.

(Verification.)
(Filed Apr. 28, 1913.) [5]

Answer.

The defendant, for answer to the complaint of the plaintiff filed herein, alleges and says:

I.

For answer to paragraph one of said complaint, this defendant admits the same.

II.

For answer to paragraph two of said complaint this defendant admits that on or about December 7th, 1912, plaintiff undertook to cross South Yakima Avenue, and was injured by colliding with one of defendant's street-cars, but this defendant denies each and every other allegation in said paragraph contained.

III.

For answer to paragraph three of said complaint, this defendant admits that plaintiff sustained certain injuries to his leg, but this defendant denies each and every other allegation in said paragraph contained.

IV.

For answer to paragraph four of said complaint, this defendant says it has no knowledge or informa-

tion sufficient to form a belief as to the facts therein contained and therefore denies the same.

V.

For answer to paragraph five of said complaint, this defendant denies the same and each and every allegation therein contained.

VI.

For answer to paragraph six of said complaint, this defendant denies the same and each and every allegation [6] therein contained, and particularly denies that plaintiff has been damaged in the sum of $10,000.00 or in any other sum whatever.

FURTHER ANSWERING, AND AS A FURTHER, SEPARATE AND FIRST AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

I.

That the accident hereinbefore admitted to have occurred was occasioned by reason of the careless and negligent conduct of the plaintiff himself, and not otherwise, in that while defendant's car was being operated on South Yakima Avenue, between 64th and 63d Streets, in the City of Tacoma, at a moderate and lawful rate of speed, plaintiff heedlessly, carelessly, recklessly, and unnecessarily placed himself in a position of great danger, to wit, by walking or running across said street in close and dangerous proximity to defendant's car and striking and colliding with said car; that plaintiff failed to exercise his mental faculties in any way to observe, escape, and avoid the risks and dangers of his position, which were open and apparent to him and could have been easily avoided; that he failed to take any care

or precaution whatever to provide for his personal safety.

WHEREFORE, defendant prays that said action be dismissed and that it go hence with its costs and disbursements herein to be taxed.

J. A. SHACKLEFORD,
F. D. OAKLEY,
Attorneys for Defendant.

(Verification.)
(Filed May 19, 1913.) [7]

Reply.

Comes now the plaintiff, Elling Remmen, and for reply to the further, separate and first affirmative defense of said defendant's answer, included in paragraph one on page two of said answer, denies the same and each and every allegation therein contained.

Wherefore plaintiff prays judgment as asked for in his complaint herein.

FITCH, JACOBS & ARNTSON,
Attorneys for Plaintiff, 406 Bankers Trust Bldg., Tacoma, Washington.

(Verification.)
(Filed May 27, 1913.) [8]

Judgment.

This cause coming on regularly for trial in open court on the 11th day of November, 1913, before Honorable Edward E. Cushman, Judge, and a jury, and the evidence having been introduced on behalf of the plaintiff as well as on behalf of the defendant,

and the jury having been instructed in the law applicable to the case by the Court, and after argument of the respective attorneys for the plaintiff and for the defendant, and the trial of said cause having been concluded on the 12th day of November, 1913, the jury retired in charge of the bailiffs of said court to deliberate of their verdict, prior to the retiring of which jury it was stipulated and agreed in open court by the respective attorneys for plaintiff and defendant that said jury might, upon agreeing, seal their verdict and return the same into court upon the convening of the court the following day, and upon the 13th day of November at ten o'clock of said day, court having reconvened, said jury returned into court with a verdict in favor of the plaintiff and against the defendant and assessed the damages of the plaintiff at the sum of four thousand seven hundred and fifty dollars ($4750.00), which verdict was, by the Court, read to the jury, and said jury was then and there, by the Court, inquired of "Gentlemen of the jury, is this your verdict?" to which they one and all responded in the affirmative, whereupon said verdict was by the Court received and filed, and said jury discharged from further consideration of said cause.

Wherefore, it is by the Court considered, adjudged and decreed that the plaintiff do have and recover judgment against the defendant, Tacoma Railway & Power Company, a [9] corporation, for the sum of four thousand seven hundred and fifty dollars ($4,750.00), together with his costs in this action sustained, to be taxed according to law and the practise of this court.

Done in open court this 13th day of November, 1913.

EDWARD E. CUSHMAN,
Judge.

(Filed Nov. 13, 1913.) [10]

Defendant's Requested Instructions.

Comes now the defendant at the close of all the testimony and moves the Court to direct the jury to find a verdict in favor of the defendant.

In the event that the Court refuses to give the above request for a directed verdict, the defendant, without waiving said request, moves the Court that the following instructions be given to the jury:

I.

I instruct you that the law presumes nothing in favor of the plaintiff or of his allegations in the complaint, and the burden of proof is on him at all times to establish affirmatively his allegations of negligence against the defendant company. He must prove this by the fair preponderance of the evidence. The fact that an accident may have occurred to him and that he may have sustained injury while crossing the defendant company's street-car tracks at about South 62d and South Yakima Avenue, in the City of Tacoma, on the day in question, raises no presumption of liability against the defendant company. The plaintiff must prove first by the fair preponderance of the evidence that the defendant company's car was being carelessly and negligently operated on South Yakima Avenue, and that no warning was given when the car ran down and injured

plaintiff, and if you find from the evidence on this point that the evidence for the plaintiff and the evidence for the defendant is evenly balanced in your minds, then your verdict must be for the defendant company, because the plaintiff has failed in his proof. [11]

The plaintiff must follow this first proof with other proof, and must likewise establish by the fair preponderance of the evidence that the injuries from which he suffered were the direct and proximate result of the negligence of the defendant as set forth in the complaint, and again if the evidence on this point is evenly balanced both for and against the plaintiff, your verdict must be for the defendant because the plaintiff has again failed in his proof.

II.

The defendant charges that this accident was the result of the carelessness and negligence of the plaintiff himself, in that while defendant's car was being operated on South Yakima Avenue between South 64th and South 63d Streets, at a moderate and lawful rate of speed, plaintiff heedlessly, recklessly, carelessly and unnecessarily placed himself in a position of great danger, to wit, by walking or running across said street in close and dangerous proximity to defendant's car and striking and colliding with said car, and that he failed to exercise his mental faculties in any way to observe, escape, and avoid the risks and dangers of his position, which were open and apparent to him and could have been easily avoided, and that he failed to take any care

or precaution whatever to provide for his personal safety.

I charge you that the rights of a street-car company and the rights of a pedestrian upon the street are mutual and concurrent, and that they must each be exercised with reference to the use of the street by the other. Neither one has the monopoly of the use of the public street, but the law holds that because of the weight and character [12] of a street-car in that it travels on fixed rails and cannot be stopped or turned out of the way as a wagon or pedestrian can, that it is the duty of a pedestrian to consider this fact in crossing the street. It is the pedestrian's duty before stepping upon the car track to make reasonable use of his senses for his own safety to ascertain whether or not a car is approaching, and to look and to listen for the possible approach of a car, particularly at a place where he knows from experience or observation that the cars are likely to be running. If he fails to look or to listen before stepping in dangerous proximity to a street-car track, or if he looks and does not see or does not heed what he does see, then he is guilty of contributory negligence, and the law has said that the plaintiff who is guilty of contributory negligence cannot recover. If you find that the plaintiff was negligent in failing to look or to listen before stepping upon the street-car tracks and that if he had looked or listened he could have seen or heard the car in time to have avoided the accident, then he is guilty of contributory negligence and your verdict must be for the defendant.

III.

I instruct you that if you find from the evidence that both the plaintiff and the motorman in charge of the street-car were negligent, and that as a result of such joint or concurring negligence, that is, the negligence of both parties concurrently contributing to the injury, the accident occurred, your verdict should be for the defendant. The law in a case of this kind does not consider the degree of negligence of the respective parties. If the defendant was guilty of negligence and if at the same time **[13]** the plaintiff's negligence also contributed to the injury, your verdict must be for the defendant, regardless of the degree or extent of the negligence of the respective parties. Where the plaintiff himself so far contributes to the accident by his own negligence or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution on his part the accident would not have happened, the plaintiff cannot recover and your verdict must be for the defendant.

IV.

A motorman or employee in charge of a street-car has a right to presume, in the absence of distinct evidence to the contrary, that a man walking across the street, crossing the street-car tracks ahead of him, will not willfully or unnecessarily place himself in a place of danger. In the absence of evidence to the contrary, he has a right to presume that the pedestrian is in the exercise of his faculties and that he will stop or turn aside before he steps into a position of danger. The failure of the motorman to

blow the whistle or ring the bell, if you find that there was such a failure, or the fact that the car was traveling at an excessive rate of speed, if you find that this was the case, would not relieve the plaintiff from the necessity of taking proper precaution for his personal safety. Negligence on the part of the company's employees in these particulars is no excuse for negligence on the part of the plaintiff; he was bound to look or listen or to otherwise inform himself of the possible approach of a street-car, and if you find that he failed to exercise his faculties to avoid the accident, or if he did see the car [14] coming and instead of stepping aside, or waiting for it to pass, undertook to cross in front of it, then the accident was the result of his own mistake, and error in judgment, and the defendant cannot be held liable.

Ry. Co. vs. Houston, 95 U. S. 697.

Woolf vs. Wash. R. R., 37 Wash. 491.

V.

When a motorman sees a man ahead of him alongside of the track, or approaching the track upon which his car is traveling, and this man is apparently able to take care of himself, and there is nothing about the appearance of the man which indicates any inability to care for himself, the motorman has a right to assume that this man will act as an ordinary, careful, and prudent man would act under such circumstances, and it is not necessary for him to stop his car until he sees that this man is in a position of apparent danger; then it is necessary for him to use ordinary care under the circumstances, to stop

his car for the purpose of avoiding a collision.

Dutean vs. Seattle Elec. Co., 45 Wash. 418.

VI.

You are further instructed, that it was the duty of the plaintiff to use his senses,—his eyes and ears —to discover the proximity and passage of the car of the defendant company, and his failure to do so would constitute contributory negligence, and prevent any recovery by him. **[15]**

If you should find from the evidence in this case that the plaintiff walked or fell into and against the side of the defendant's street-car, then your verdict must be for the defendant.

VII.

Ordinary prudence and common sense suggest to everyone who is aware of the character and operation of electric street-cars that it is dangerous to pass in front of them at a short distance while in motion, and one who does so without looking and listening, when, if he had looked and listened, he could have discovered the car, is guilty of contributory negligence and cannot recover; and if you find if the plaintiff had looked and listened he could have discovered the car, and thus have avoided the accident and injuries, and that he failed to do so; your verdict must be for the defendants.

VIII.

If you find from the evidence that plaintiff could by the exercise of ordinary care, and after he saw the street-car, have avoided the injury to him by getting off the track, before the car struck him, then and in that event your verdict must be for the defendant.

IX.

You are further instructed that if the plaintiff thot he had time to cross the track of the defendant company, if he was attempting to cross the track, before the car of the defendant company would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff, and he cannot recover, and your verdict must be for the defendant. **[16]**

X.

You are instructed that if the plaintiff failed to look and listen, and stop, if necessary, or to take any reasonable precaution whatever to ascertain whether a car was coming upon the track of the defendant company, then and in that event it was negligence upon the part of the plaintiff to attempt to cross the track of the defendant company, if the car of the defendant company was in close and dangerous distance of the plaintiff.

XI.

You are further instructed that, notwithstanding you should find that the defendant was guilty of negligence, in the operation of the said car, yet, if you further find that the accident or the injury to the plaintiff would not have happened except for the negligence or failure to use ordinary care on the part of the plaintiff, then your verdict must be for the defendant.

XII.

If you find from the evidence that plaintiff could, by the exercise of ordinary care, after he saw the street-car, have avoided the injury to him by getting

off the track, before the car struck him, then and in that event your verdict must be for the defendant.

XIII.

You are further instructed that, if a person be seen upon the track of defendant company's electric street railway who is apparently capable of taking care of himself, the motorman may assume that such person will leave the track before the car reaches him, and this presumption may be indulged in so long as the danger of injuring him [17] does not become imminent, and it is not necessary for a motorman to slacken the speed of the car until such danger does become imminent.

XIV.

The burden is upon the plaintiff to show by the fair preponderance of the evidence the nature and extent of the injuries he sustained, and you are not justified in awarding him compensation for purely speculative injuries or results which might or might not happen. You will not allow anything by way of punitive or speculative damages.

XV.

If you find for the plaintiff in this case you will confine your verdict to such an amount as will compensate him for actual loss and damage, in the case. You will not allow anything by way of punishment or exemplary damages. There should not be any idea of punishing the defendant in your minds, but simply that of compensating the plaintiff for his loss, if, as I said before, you should find from the

evidence that he is entitled to recover anything.

J. A. SHACKLEFORD,
F. D. OAKLEY,
Attys. for Deft.

(Filed November 12, 1913.) [18]

Petition for New Trial.

Comes now the Tacoma Railway & Power Company, defendant in the above-entitled action, and moves this Honorable Court for an order vacating and setting aside the verdict of the jury and the judgment made and entered in the above-entitled action on the 14th day of November, 1913, and granting a new trial for the following causes materially affecting the substantial rights of the defendant:

I.

Excessive damages appearing to have been given under the influence of passion or prejudice.

II.

Error in law occurring at the trial as follows:

(a) The Court erred in refusing to grant defendant's motion for a directed verdict, and in refusing to grant the requested instruction for a directed verdict.

(b) The Court erred in refusing to give defendant's requested instruction #9 as follows:

"You are further instructed that if the plaintiff thought he had time to cross the track of the defendant company, if he was attempting to cross the track, before the car of the defendant company would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part

of the plaintiff and he cannot recover and your verdict must be for the defendant."

(c) The Court erred in refusing to give defendant's requested instruction #10, as follows:

"You are instructed that if the plaintiff failed to look and listen and stop if necessary, or to take any reasonable precaution whatever to ascertain whether the car [19] was coming upon the track of the defendant company, then and in that event it was negligence on the part of the plaintiff to attempt to cross the track of the defendant company, if the car of the defendant company was in close and dangerous proximity to the plaintiff."

III.

Insufficiency of the evidence to justify the verdict, for the reason that the evidence failed to disclose any negligence of the defendant, or its employees, which caused or contributed to any injury sustained by the plaintiff; that the evidence shows conclusively that the plaintiff failed to either look or listen or otherwise to inform himself as to whether or not a car was approaching at the time he stepped upon the track, if he did step upon the track, and was guilty of contributory negligence in failing to do so.

J. A. SHACKLEFORD,
F. D. OAKLEY,
Attorneys for Defendant.

(Filed Dec. 17, 1913.) [20]

Order Overruling Petition for New Trial.

This cause coming on regularly for hearing in open court before Hon. Edward E. Cushman, Judge, on the 22d day of December, 1913, upon the motion of the defendant, Tacoma Railway & Power Company, for a judgment notwithstanding the verdict, and upon the petition of the defendant, Tacoma Railway & Power Company, for a new trial of the above-entitled cause; and the Court after argument of counsel and being fully advised, doth consider and adjudge that said motion for judgment notwithstanding the verdict be and the same is overruled and denied; and the Court doth further consider and adjudge that the said petition for a new trial of the above cause be, and the same hereby is, overruled and denied, to which judgment of the Court the defendant, Tacoma Railway & Power Company, excepts, which exception is by the Court allowed.

Done in open court December 23d, 1913.

EDWARD E. CUSHMAN,
Judge.

(Filed Dec. 23, 1913.) [21]

Assignments of Error.

Comes now the defendant, Tacoma Railway & Power Company, a corporation, and files the following Assignments of Error, upon which it will rely upon its prosecution of its Writ of Error, in the above-entitled cause, in the United States Circuit Court of Appeals, for the Ninth Circuit, for relief

from the judgment rendered in said cause:

I.

The Court erred in refusing to give defendant's requested instruction as follows:

> "You are instructed to bring in a verdict in favor of the defendant."

For the reason that the evidence failed to disclose any negligence on the part of the defendant company, and showed conclusively that the plaintiff was guilty of contributory negligence.

II.

The Court erred in refusing to grant defendant's motion for a directed verdict in favor of the defendant on the following grounds therein set forth:

1. That the evidence has failed to disclose any [22] negligence on the part of the defendant company; the evidence has failed to show that the car was being operated at an excessive and unlawful rate of speed.

2. That the evidence fails to show any grounds for the submission of the case to the jury on the ground of the last clear chance. It is not an issue in this case, and there is no evidence to show that the motorman in charge of the car in controversy failed to exercise ordinary care after he discovered the plaintiff's dangerous position on the track, or near the track.

3. The evidence shows that the plaintiff himself was negligent in not using his senses in any way whatever to ascertain the approach of defendant's car; that he failed to either look or listen or otherwise inform himself as to whether a car was approaching

at the time he stepped upon the track, if he did step upon the track; that, had he looked, he could have seen the car, and was guilty of contributory negligence in failing to look or listen.

III.

The Court erred in refusing to grant defendant's motion for a judgment notwithstanding the verdict, for the reason that the verdict was contrary to the instructions and was not based upon sufficient evidence to support the same; that the evidence failed to disclose any negligence on the part of the defendant company, and showed that the plaintiff was guilty of contributory negligence.

IV.

The Court erred in overruling defendant's petition for a new trial on the grounds therein set forth. [23]

V.

The Court erred in refusing to give defendant's requested instruction number nine as follows:

> "You are further instructed that if the plaintiff thot he had time to cross the track of the defendant company, if he was attempting to cross the track, before the car of the defendant company would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff and he cannot recover, and your verdict must be for the defendant."

For the reason that said instruction correctly states the law applicable to the facts, and the Court refused and neglected to give an instruction embodying the same principle of law, and the jury were left without

proper guidance, and defendant was thereby deprived of a fair trial.

VI.

The Court erred in refusing to give defendant's requested instruction number ten, as follows:

> "You are instructed that if the plaintiff failed to look and listen, and stop, if necessary, or to take any reasonable precaution whatever to ascertain whether a car was coming upon the track of the defendant company, then and in that event it was negligence upon the part of the plaintiff to attempt to cross the track of the defendant company, if the car of the defendant company was in close and dangerous distance of the plaintiff."

For the reason that said instruction correctly states the law applicable to the facts, and the Court refused and neglected to give an instruction embodying the same principle of law, and the jury were left without proper guidance, [24] and defendant was thereby deprived of a fair trial.

WHEREFORE, defendant, plaintiff in error, prays that the judgment of the Honorable District Court of the United States for the Western District of Washington, Southern Division, rendered in the above-entitled cause, be reversed and that such direction be given that full force and efficiency may inure to the defendant by reason of defendant's defense to said cause.

J. A. SHACKLEFORD,
F. D. OAKLEY,
Attorneys for Defendant.

(Filed April 16, 1914.) [25]

Transcript of Evidence and Proceedings.

BE IT REMEMBERED, that heretofore and upon, to wit, the 11th day of November, A. D. 1913, this cause came on duly and regularly for hearing before the Hon. E. E. CUSHMAN, Judge of the above-named court, and a jury.

The plaintiff, being represented by his attorneys and counsel, Messrs. FITCH, JACOBS & ARNTSON; and,

The defendant being represented by its attorneys and counsel, J. A. SHACKLEFORD, Esq., and FRANK D. OAKLEY, Esq.

Whereupon the following proceedings were had and testimony taken, to wit: [26]

[Testimony of Elling Remmen, the Plaintiff, in His Own Behalf.]

ELLING REMMEN, the plaintiff, being called and sworn in his own behalf, testified as follows:

Direct Examination.

(By Mr. JACOBS.)

I am thirty-nine years old and reside one-half mile east from Fern Hill Schoolhouse, in Tacoma, and work on the waterfront, longshoreman, warehouse and harvesting. On the 7th day of December, 1912, I left my home at about half-past one o'clock and went downtown. I had sixty-five cents in money and paid five cents for car fare,—bought a glass of beer and then I bought fifty cents' worth of alcohol and then another glass of beer, at about five o'clock P. M. with my last nickel. I then started to walk home

(Testimony of Elling Remmen.)

and was run down by a street-car. Plaintiff's Exhibits 1, 2, and 3 I recognize as photographs of South Yakima Avenue between 61st and 63d Streets. About the time I crossed 61st Street "I seen a light that seemed like it was swinging on to the left,—striking to the left. I judged it to be on the Alki switch. They call it 65th Street switch on Yakima Avenue." I thought the light was a car coming downtown, going in on to the switch. I was very close to the crossing or on it when I saw the light. "I got a little further and a car came along at a good speed and passed me going from town, the same direction I was going. I might have been almost in the centre of that block. Not any more. Just a little after she passed me I was about in the centre of the block, I heard a blast of the whistle because I took notice of it. I thought that was a car that was coming behind, a tripper, as I knew by the time of the night it was, and thought it was a signal to the car that swung in first onto the switch [27] for her to stop and wait until that tripper came up." When I heard the whistle I was halfway between the fence and 61st Street. I walked down until I got to a place where the sidewalk stops, at a place I marked "X" on the photograph. I started to walk across the street to the left as I could not go further on the sidewalk, and there was an orchard and the fence in front of me. As I started to cross the street I thot I heard something. I was satisfied that I heard a car coming from the direction of town, going south. At that time I was off the end of the sidewalk, out

(Testimony of Elling Remmen.)

in the street. I kept on walking and looked around to see if I could see the headlight of the car. "I thot I seen the headlight and also other lights, but I tried to get my eyes trained on it, fastened upon the headlight of the street-car and I did not see anything so close to me that I thought there was any danger, and so I straightened up again and about that time I was on the street-car track and as I glanced ahead I saw a very short distance from me a street-car, and I thought I could make it, and I tried to jump like this, and at the same time she struck me and she rolled me over and I landed on my arms underneath." I looked southward all the time I was walking on the sidewalk and saw no street-car up to the time I started to turn out across the street. There was a street light at the place I turned to go across and a path at that point. A street light is marked [28] "X" on the Exhibit 3. 'XX shows location of Alki switch on Exhibit 3. Plaintiff's Exhibit One shows where I walked south on the sidewalk until I got to the fence that stands out in the street a good many feet, and passed the parking, and there is a well-trodden path over and across from here to here, indicating."

When I looked towards the north, thinking I heard a street-car I was between the sidewalk and the end of the fence, started off the sidewalk. I was walking across "over to * * * aiming to get to that sidewalk over there on the other side." I do not remember anything [29] further until two policemen picked me up in the car at the Interurban Depot.

(Testimony of Elling Remmen.)

Someone said, "Is he drunk?" I said, "I am not drunk; I am hurt." I was taken to the hospital and stayed there for seven weeks,—was attended by Dr. Love, surgeon for the defendant. I cannot do any work. Can walk possibly a block without a cane, but it is an effort, a very hard struggle.

Cross-examination.

(By Mr. OAKLEY.)

The company took care of me at their expense. I was laid off for a few days before this accident, sick. I was canvassing for razor sharpeners for a few days before the accident. I have been taken to the police station in the patrol at different times for being intoxicated. It must be four and one-half miles from where I left 15th Street to the place where I was injured. It is a block from 61st Street to the fence. As I got to 61st Street I thought I saw a swinging light on the switch. I did not see any car, but the light must have been from the car. I did not see a car at any time coming from the south, "until she was as close as you are to me." My view was obstructed by the orchard and the fence.

Q. Did you at any time from the time you went out back of that fence out into the street, look to see whether a car was coming from that direction, or not?

A. No, sir. I looked the other way as I thought that I heard a car coming up the other way.

Q. Where were you when you looked for the car coming the other way?

A. I was leaving the sidewalk to go out into the street. [30]

(Testimony of Elling Remmen.)

Q. You were leaving this cement sidewalk?

A. The end of the cement sidewalk, yes, sir. Then I looked down towards Tacoma and thot I saw a headlight.

A. I tried to be sure of it and kept on walking and then turned around up the other way as I thot that car was not close enough to hurt me anyhow, and then I got my eye on this other car.

Q. When did you hear the blast of the whistle?

A. Probably one halfway between 61st Street and the fence.

Q. Where did that come from?

A. It sounded from the south, Alki switch.

Q. You heard the blast of a whistle halfway between 61st Street and the fence? A. Just about.

Q. Then you knew the car was coming?

A. I thot the car was going to stay there on account of another car coming up.

Q. You knew what the blast of the whistle of a street-car means? A. I thot it meant to stop.

Q. Did you ever hear a street-car give a whistle when it was going to stop?

A. For another car behind it.

Q. Why did you look towards the city when you heard the whistle at Alki switch?

A. I thot there was a tripper behind the one coming on south. I thot the car was coming and was going to stay there on account of another car coming up. I thot the whistle meant to stop. I looked towards the city when I heard the whistle at Alki switch, because I thot there was a tripper behind [31] the one coming on south.

(Testimony of Elling Remmen.)

Q. You did not pay any attention at all to the whistle? A. I did, sir.

Q. What did you do?

A. I looked for the car coming.

Q. Did you look in the opposite direction?

A. I did, sir, because I thot this meant for the car coming from the opposite direction.

Q. What kind of a whistle?

A. Just one short blast. I think the edge of the fence is twelve feet from the street-car track.

Q. Where were you when you were hit by the street-car?

A. I must have been between the two tracks, and when the * * * [32] I seen the car and made a jump and got just about to the east track there. When I first saw the street-car that struck me it was ten feet away, and I was about the middle of the car track. I was struck right opposite this fence. The right side of my body was struck by the car. I could not say it was the side or end or what part of the car struck me. I did not know anything about the fender of the car. I did not see any headlight on the car. After I left 38th Street it was raining a little drizzle.

[Testimony of C. R. Bailey, for Plaintiff.]

C. R. BAILEY, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. JACOBS.)

I am a warehouse foreman of the Sperry Flour Mills, for whom Mr. Remmen worked at different

(Testimony of C. R. Bailey.)
times. The work was satisfactory. He never came to work intoxicated, or under the influence of liquor.

[Testimony of Oren Polley, for Plaintiff.]

OREN POLLEY, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. JACOBS.)

In December, 1912, I resided at #6511 South "G" Street, and on the 7th day of December, 1912, witnessed the accident. I had been waiting at 64th and Yakima Avenue south for a car, waited about half an hour and there was no cars came along and I seen what I thought was one car at the time down at 56th and South Yakima Avenue, and then I walked down to 61st Street to take the car instead of standing there; it was a cold, nasty, wet evening, [33] and so I started on down and I walked down pretty close to 62d Street and there was one of those cars passed me; I was about 63d Street when one of the cars passed me south, going towards Fern Hill and I was going to run first,—I thought I would not have time to catch it, and then I see this, car coming,—it was coming from 56th Street and Yakima Avenue, and I was walking slow—in the meantime I seen this gentleman who was hurt coming on the other side of the street, right opposite from me, and as he crossed—came towards the track, I heard a sound and there was this other car coming and he was just about the centre of the track then, and they did not blow a whistle or give a signal that there was a car coming and it struck him before he got a chance to step

(Testimony of Oren Polley.)

off, struck him with the corner of the car.

Q. Where was he?

A. Just making his last step, if he had a second more he would have got off, but he was making his last step to get off the rails.

On Exhibit I, I marked the place where I was when I saw him with the letter "O." When the car struck him it threw him about to where the letter "V" is. I was right in between the sidewalk and the telephone pole, when he was hit. The right-hand corner of the car hit him. I was about 75 feet from him when they hit him. When I first saw the car or heard it, it was just about opposite to me. I was watching it over at 56th Street. I thot the tripper was coming to follow in the Alki switch, and I was watching for those fellows—there was one car went up and there was another tripper at 56th Street, and I supposed it was going to pass it at Alki switch, and therefore I had plenty of time to get it. I expected both cars coming from town were going to pass at Alki switch. [34]

The car was about 100 feet from the plaintiff when I first saw it. I yelled just as it struck him and they knocked him off the track. Just before the car reached him I saw the plaintiff going from the sidewalk near the fence which projects about 12 feet out. The car gave one long blast of a whistle just after it hit him. There was a car following this car. It had stopped at 64th Street to pick up passengers. Neither 62d or 63d Streets are cut through. After he was hit they placed him up against the bank, at the placed marked X. I heard the conductor say,

(Testimony of Oren Polley.)

"Let the damn fool lie there; he is nothing but a drunk."

Q. Who said that?

A. The motorman on the front car that struck him.

At the depot the motorman said, "He is drunk," and the fellow says, "No, I am hurt." At the time of the accident the motorman said the plaintiff walked into the side of the car. As the car passed "I seen the motorman rubbering back at his conductor in the back end. He had his doors open."

Cross-examination.

(By Mr. OAKLEY.)

When the motorman blew the whistle Remmen was lying there in the mud. When I heard the car coming I turned around and saw that the car was about 100 feet from Mr. Remmen, who was coming on to the track. He was on the track when I turned my head again. Just going to stop and step off the track. I did not have any trouble in seeing or hearing the car. Just as I turned around they struck the man. He was looking towards 56th Street. [35]

[Testimony of John E. Timmermann, for Plaintiff.]

JOHN E. TIMMERMANN, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. FITCH.)

On the evening of December 7th, 1912, I was a passenger on the car that struck plaintiff. I boarded the car with my wife at Fern Hill, and a little before we reached Akli switch the conductor had gone up into the front vestibule with the motorman, and he

(Testimony of John E. Timmermann.)
shook the door and the motorman opened it and he went out and came back in. They stayed out there until just about the time they reached the switch, and the conductor came out of the car and he pulled the doors up and they laid there on the siding for about a minute and there was another car coming up. After the car had passed we started on and the swaying of the car had opened the doors connecting the front vestibule with the inside of the car. As we hit 64th Street I looked out of the car at the front end, the doors were still working themselves open, and I noticed the motorman looking back inside of the car over his shoulder, and I looked at him steadily from that time on until I happened to see into the distance a man standing there as I thot at the side of the track. It struck me for a moment that he was pretty close to it, and I could see this man standing there, as I thot he was, all the while the motorman was looking back. In fact, I was looking at him and this fellow was almost in a line with me, and so I could not help from seeing both of them. So we got up to this fellow and I supposed he was out of harm's way and thot nothing of it, and I thot I felt the impact of something hitting the car. At the same time the motorman turned [36] around and slapped off his power and stops the car. I did not get off the car immediately. They took plaintiff and put him on the car. The motorman off the car that followed and the conductor from the other car brought him in and put him about the middle of the car in a seat opposite to us. They laid him to the south of the house with the little porch sticking out here in front (indicat-

(Testimony of John E. Timmermann.)

ing). I noticed the stump that night to my right. From the time the car left 64th Street up to the time plaintiff was hit, the motorman was looking back into the car. I was sitting on the left-hand side of the car and did not see plaintiff before he had crossed the track. I thot probably he was standing at the crossing at 63d Street waiting for the car. I did not know whether he was on the track or off the track at that time.

Cross-examination.

(By Mr. OAKLEY.)

When I first saw Mr. Remmen the car was anywhere from 100 to 125 feet from him. I thot he was waiting for the car. He was on the right side of the car,—"on the right side as you come down,—the proper place for anyone to wait for it." I was seated two seats from the rear of the car, not counting the one that runs lengthwise of the car. The plaintiff was facing to the south when I saw him, what would be towards 61st Street. I could see the "V" of his vest and his shirt front. From appearances the way he was standing he seemed to be looking towards the car. I could not see his head. I did not hear a whistle at any time. I could see a bright headlight ahead. I was looking at the motorman. I did not see Mr. Remmen move after the first time I saw him. I could not say whether it was the front or side of the car that hit [37] him. I made a written statement. Defendant's Exhibit "A" is correct, except that part about the motorman's head being in the way of Mr. Remmen, because the motorman's head was

not in the way until he blocks the entire view. In other respects it is the same.

[Testimony of Dr. W. D. Reed, for Plaintiff.]

Dr. W. D. REED, being called on behalf of the the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. FITCH.)

I am a regularly licensed and practicing physician and surgeon in the State of Washington, and have been practicing in Tacoma for a number of years. I examined Mr. Remmen after the accident and found there was a slight depression in the side of his head. Hearing in left ear diminished. I found that the right shoulder was slower in action and more limited. Also that the principal trouble was that his right knee was considerably swollen, the tissues thickened about it; also that the internal cartilage of the knee-joint had been dislocated, broken, and internal condyle, or the extended portion of the thigh bone, on the inner side, there was a considerable callous. The injuries are permanent. [38]

[Testimony of Dr. W. M. Karshner, for Plaintiff.]

Dr. W. M. KARSHNER, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. FITCH.)

I am a regularly licensed and practicing physician in the State of Washington, and reside and practice in the city of Puyallup. From an examination of the plaintiff I found the hearing in the left ear impaired, about one-fourth. I also found a slight de-

(Testimony of Dr. W. M. Karshner.)

pression on the right side of the head. What caused it I do not know. I found a floating cartilage in the right knee. The right knee is about three-quarters of an inch larger around than the left one. The injuries are probably permanent.

[Testimony of Mrs. John E. Timmermann, for Plaintiff.]

Mrs. JOHN E. TIMMERMANN, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. FITCH.)

I boarded the car with my husband, John E. Timmermann,—after the car left 64th Street the motorman was looking back into the car, all the while until it felt like he hit something, and then he stopped.

Cross-examination.

(By Mr. OAKLEY.)

The conductor was right back of us collecting fares, near the rear end of the car.

[Testimony of Mrs. Anna Remmen, for Plaintiff.]

Mrs. ANNA REMMEN, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. FITCH.)

I am the wife of the plaintiff. I saw my husband [39] at the hospital, the day after the accident,—he was in a dazed condition and did not seem to realize much, and claimed that he was hurt about the neck, head, shoulder, knee and ankle. Since then he has

(Testimony of Mrs. Anna Remmen.)

been complaining about his head and his knee has always pained him.

[Testimony of Miss Etta Erickson, for Defendant.]

Miss ETTA ERICKSON, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am a nurse in the Tacoma General Hospital, and was so employed on the 7th day of December, 1912, I saw the plaintiff when he was brought in after the accident. I think he was intoxicated. He was very noisy and his breath smelled of liquor. He was boisterous. For about an hour or so I had trouble taking care of him. He did not appear to be out of his head, only talking irrationally. I do not know whether his clothing had been saturated with a bottle of alcohol—it might have been from that source.

[Testimony of Elmer J. Calkins, for Defendant.]

Mr. ELMER J. CALKINS, a witness called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am one of the city jailers and am acquainted with the plaintiff. I saw the plaintiff at the Interurban Depot. We took him out of the car and took him into the city ambulance or patrol wagon up to the hospital. I assisted in getting him out of the car. He was intoxicated. I have seen him in the city jail perhaps four times for being intoxicated. I have seen him paralyzed drunk and have seen him [40]

(Testimony of Elmer J. Calkins.)

to the extent of having delirium tremens. He has been in the city jail since the accident.

Cross-examination.

(By Mr. FITCH.)

I believe he was drunk when he was in the city jail since the accident. I am not positive. I am sure that he was drunk when I took him out of the car. I do not remember whether the motorman or conductor said that he was drunk. No one told me that he was drunk at that time. I do not remember that Mr. Remmen said, "No, I am hurt." If the bottle of alcohol had been broken in his pocket I might have smelled it instead of his breath. I have seen him drunk before and I think he was drunk at that time. I could tell from his talk.

[Testimony of Charles S. Payne, for Defendant.]

CHARLES S. PAYNE, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live in the City of Tacoma and have been employed as motorman for the defendant from two years back, and was in charge of the car at the time of the accident in controversy. "I seen a man run out from the sidewalk; when I first seen him he was about eight feet from the car, from the side. He appeared as though he wanted to catch the car. I was inbound, this side of 64th street, between 64th and 63d streets, and when I seen him I tooted the whistle, and he started to step out and he struck the car somewhere about the center of the car. The street light

(Testimony of Charles S. Payne.)

was out at 63d street and I saw him when he come into the rays of the light of the car." [41] "I seen him come staggering through the mud towards the car and he struck, as near as I could tell by looking in the glass from ten or fifteen feet from the rear of the car, and went backwards into the mud, and then he went out of my view in the glass and I stopped about a car and a half length or two car-lengths from where he fell." The car did not stop at 64th Street, which is about 100 or 150 feet from Alki switch,—the car was traveling at about ten or twelve miles per hour. The car was about 50 feet long, with back vestibule on both ends with center posts, with two folding doors inside the entrance on both ends of this car. The doors were closed and hooked. I know positively the conductor tried to get out at Alki switch to get through the head end in order to put the trolley on and the doors were hooked and I did not open them. The doors were opened last at Fern Hill when I hooked them there. The curtains obstructed the view of all passengers who could not see into the vestibule. The curtains pull down on the inside of the car and the curtains are used to keep the light out from reflecting on the window so you can see ahead and see around. If these curtains are up the light would reflect on the windows and you could not see past the windows. It is absolutely necessary to have the curtains pulled down. I could not see where the conductor was on account of the curtains, but I could hear the register ringing. He was collecting fares. I was not looking back into the car

(Testimony of Charles S. Payne.)

after leaving 64th Street. I was looking straight ahead. The front slide window was down. There were people standing at 64th Street but we did not stop, I let the car following us pick them up. This car was three or four car-lengths behind us. [42] When Mr. Remmen was struck our car had gone about three-quarters of a block beyond 64th Street, and at the point in front of Mr. Barrett's house. When I first saw Remmen he was staggering towards the car. To the right of the car in the street. He was out in the traveled road about six or eight feet from the car track. I was then about a car-length from him when he came out of the road onto the track when I first saw him. I then started to stop. I blew the whistle as soon as I saw him. There is a mirror which is fastened on the side of the vestibule of both ends. On both ends of the cars which have double ends, set at an angle so that a motorman can look into it and see everything at the rear of the car within six or eight feet from the car. I saw Mr. Remmen through this mirror hit the car and take a couple of staggering steps and then fall out of my view. There are step lights on the car, one in front and one back of the car. These lights show everything up so you can see everything between the mirror and the rear light on the step. The car had fenders on both ends. If a man was struck by one of these fenders it would pick him right up. Mr. Remmen was not struck by a fender. After I saw him hit the side of the car I stopped immediately, jumped out of the car and ran over to where he was.

(Testimony of Charles S. Payne.)

I was the first one there. He was lying on his back in the mud, about four feet or five feet from the track. I stooped over to pick him up and his breath smelled strongly of liquor. When I stopped the car the front end of the car was at about 63d Street, and he was about two car-lengths back from 63d Street. About in front of Barrett's house. Mr. Barrett telephoned from his house for the city ambulance. [43] The headlight in the car was light at the time and in good condition.

Cross-examination.

(By Mr. FITCH.)

I know we were on time,—that at no time after we left Alki switch was your door open into the car. I was not looking back over my shoulder into the car. The door was closed because the front window was open. When we passed 64th Street, the car was going between three and five miles per hour. I am positive that we were not five minutes behind time when we reached Fern Hill. Sixty-third Street is not open thru,—there is a gate right about the center of the fence at that point. There is a sidewalk running parallel with the track. The cross street where 63d Street would come in is not graded. It is just a board crossing,—it is about 120 feet from the south line of 64th Street, up to the south line of the fence. I stopped with the front end of the car on 63d Street. When Mr. Remmen ran into the side of the car he was about a car-length south of the south end of the fence. I never noticed the fence particularly at all. It was not usual for people to go across the street on

(Testimony of Charles S. Payne.)

the path near the north side of the fence. It was muddy there. The car ran about one and one-half to two car-lengths after striking the plaintiff. I could not state for sure whether the plaintiff was taken to the bank or not. There is an embankment six or eight feet. I could not climb up there anyway. I am not positive whether we laid him up there or not. I did not make the statement that he was drunk and that he had better be left there. [44]

Redirect Examination.

(By Mr. OAKLEY.)

The accident happened about 7:00 o'clock P. M., according to my watch.

[Testimony of Dr. L. L. Love, for Defendant.]

Dr. L. L. LOVE, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am a regularly licensed and practicing physician and surgeon in the State of Washington and am physician and surgeon for the defendant company. I saw the plaintiff on the morning of December 8th, 1912, at the hospital. He was in bed with a badly swollen knee, some disfigurement about his face and complaining of his shoulder. He told me that he was in Tacoma on Pacific Avenue on the evening of December 7th, with sixty-five cents in his pockets, bought a flask of whiskey with fifty cents, two glasses of beer with the other ten cents and then walked home. That he got hurt,—did not know the manner in which he got hurt, but that he had been drunk for

(Testimony of Dr. L. L. Love.)

four days before this happened. There was evidence of his intoxication at that time. He had a foul breath and coated tongue, and every indication that he had been intoxicated. I treated him for several weeks. Put his leg in a plaster cast and the last time I saw him he had an internal fracture of the internal condyle of the femur. The skull was in a practically normal condition. He had no trouble with his ears as far as I knew. [45]

Cross-examination.

(By Mr. FITCH.)

I believe he complained of a head cut but there was no indication of head injuries. No bleeding of his ears or mouth. No injury to his head. No depressions of the skull. I am of the opinion that unless he has an operation his knee will bother him more or less.

[Testimony of Edward J. Peacher, for Defendant.]

EDWARD J. PEACHER, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am a chauffeur working for the Pacific Taxicab Company and on the 7th day of December, 1912, I was living at Parker Street on the Spanaway line and was a passenger on the car on the night of the accident. I got on at Fern Hill and was standing on the back platform next to the entrance and as we passed 64th Street, I looked out and looked ahead to see where we were. I was intending to get off at 61st Street, and just as I looked out I saw a man very

(Testimony of Edward J. Peacher.)

near the side of the car, and a second later he was up against it and when we hit him it turned him around a couple of times, and he lit on his back in the mud, about the middle of the street. He was still standing when we passed him. I was right on the back platform, right at the entrance. When I first saw the plaintiff he was right longside of the car and then within two or three feet of it. The front end of the car had passed him. The car went about 100 feet after Mr. Remmen fell. I had lived within four blocks of this place for about two years and am familiar with the [46] location of everything along there. Mr. Remmen struck the side of the car about halfway back and after the rear end had passed him he fell. I saw him just as he lit in the mud. The car was traveling fifteen miles per hour, not more. Mr. Remmen fell about 100 or 150 feet from 63d Street. I then rode on the car to 61st Street and got off. I do not think I heard the motorman say anything about leaving the drunk lie there.

Cross-examination.

(By Mr. FITCH.)

The point where I saw Mr. Remmen run into the car was about 150 feet south of 63d Street.

[Testimony of Alfred Fuller, for Defendant.]

ALFRED FULLER, being called in behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live about one block south of where the accident happened and have lived there for about eleven years.

(Testimony of Alfred Fuller.)

I got on the street-car following the one that struck Mr. Remmen at 64th Street. The car I was on followed the head car at about two or three hundred feet distant. I was on the rear platform when the car stopped. I saw Mr. Remmen lying in the road. He had not been picked up yet. The motorman off the car I was on and the motorman on the other car picked him up and laid him across the street at a point somewhere between 63d and 64th Streets. I was there until they put him on the car and started off. The car that struck Remmen was about a car or two car-lengths ahead of where he lay. [47]

Cross-examination.

(By Mr. JACOBS.)

I lived there in the back of the green house, right near the gate. The night was dark, it had been raining, because the roads were awfully muddy. I did not notice any lights on the pole. Whether there was one there or not, I do not know. When I got off the car I looked at the place where I saw the man lying and I go by that place two or three times a day and have for many years.

[Testimony of Louis Barrett, for Defendant.]

LOUIS BARRETT, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am a patrolman for the City of Tacoma, and live pretty close to the point where the accident happened. I saw there was some trouble from our sitting-room. That the car had stopped and I and my

(Testimony of Louis Barrett.)

daughter opened the front door and went out and we saw the man that got hurt. "We went out to where the car was." I saw that the man was all muddy and that he was hurt, so I told him that it was pretty hard to get the patrol wagon down there and that they had better take him down on the car, so I went across to the neighbors and called up the police station and had the wagon meet the car at the Interurban Depot. When I saw Mr. Remmen he was sitting up a little ways from the car towards 64th Street,—not more than 20 or 25 feet from my house. [48]

[Testimony of Dr. R. S. J. Whittaker, for Defendant.]

Dr. R. S. J. WHITTAKER, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am a regularly licensed and practicing physician and surgeon in the State of Washington. I made an examination of the plaintiff at which time his only complaint was in regard to his knee. I made an examination and found that he suffered from a fracture of the inner side of the lower end of the femur, where there was a diagonal fracture. In order to remedy the condition it would be necessary to perform an operation.

[Testimony of Miss Nellie Barrett, for Defendant.]

MISS NELLIE BARRETT, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live at #6316 South Yakima. My father testified in this case yesterday. I was in our house at the time of the accident, and my attention was called to a car stopping in front of the house, and I looked out and I saw the car stop. It is unusual for the car to stop in front of our house, and I called my father's attention to it because I saw a man who was hurt. The point where Mr. Remmen was hurt was about five lots from 64th Street. It was some five lots from 63d Street. Our house is nearly to 64th Street, nearer than to 63d Street. The car had not reached 63d Street. [49]

[Testimony of William J. Baird, for Defendant.]

WILLIAM J. BAIRD, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

On the night of the accident I boarded the car following the one that struck Mr. Remmen, at Fern Hill. When I first saw Mr. Remmen they were starting to take him up from alongside of the track. They were picking him up after we left 64th Street. I did not know how close it was to 63d Street. I could not say that it was between 63d Street and 64th Street. I did not pay any attention to that.

[Testimony of Martin E. Cramer, for Defendant.]

MARTIN E. CRAMER, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live at Puyallup and have been employed by the defendant company as motorman for thirteen years. I was motorman on the car following the one in which the accident occurred. I was following the Larchmont tripper. We got to Alki, delayed there for a little while, passed a car, and the Larchmont tripper pulled out and I pulled out immediately behind it. There were a few people standing at 64th Street and I was shortly behind the car. I gave two toots of the whistle to tell the motorman to go ahead and I would pick up these. It is the general custom to do that at that time of the evening, to make every other stop, in that way so both cars will make time, and I stopped at 64th Street to pick up the people and pulled out. When I saw the other car slowing down I slowed down. I stopped my car, I guess two car-lengths from the other car, and we went up and [50] saw Remmen lying out in the street between the track and the curb, about ten feet from the car. I heard a man say that he must have been drunk. I made the remark then, "This is not the first time I have seen him that way," and so we carried him over to the bank, which was about two feet high. Where I picked him up was between 64th and 63d Streets. I should say about two car-lengths from 63d Street. Mr. Remmen appeared to me to be intoxicated. I

(Testimony of Martin E. Cramer.)

do not remember seeing any bottles around there. I have seen him intoxicated several times about Fern Hill. I waited once there for him to get off the track. It is always customary when the lights are turned on in the cars to pull the curtains down. If this is not done lights burning in the car will throw a reflection out through the window. The mirror located on the right-hand corner of the car is hung so that all I have to do is to look into the glass and can see each and every person who gets on the car.

Cross-examination.

(By Mr. FITCH.)

The main use of the mirror is for observing people boarding and leaving the car. The mirror also affords great facility in stopping on crossings where the streets are muddy. If a motorman looks into his mirror he can get the crossing nine times out of ten. If a motorman is looking into the mirror he is not looking directly ahead. He is looking through the side window. The accident occurred about a quarter to seven. [51]

[Testimony of Fred G. Woodward, for Defendant.]

FRED G. WOODWARD, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am employed as a draftsman by the defendant, and am the one who made the map of the street involved in this controversy, which is marked Defendant's Exhibit "B." The distance between 61st and 64th Streets is 970 feet. The distance between 63d

(Testimony of John A. Jackson.)

and 64th Streets is 483 feet. The distance from the fence to 61st Street is 293 feet.

[Testimony of John A. Jackson, for Defendant.]

JOHN A. JACKSON, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am assistant claim agent for the defendant company. I made a search for Mr. Porter, the conductor in charge of the car at the time of the accident and found that he had gone south into California, and was unable to get him for the trial. [52]

Thereafter, at the close of all the testimony, the jury being excused, counsel for defendant made motion for a directed verdict in favor of the defendant as follows:

[Defendant's Motion for a Directed Verdict, etc.]

The defendant, at the close of all the testimony on behalf of both the plaintiff and the defendant, moves the Court to direct the jury to return a verdict for the defendant on the following grounds:

1. That the evidence has failed to disclose any negligence on the part of the defendant company; the evidence has failed to show that the car was being operated at an excessive and unlawful rate of speed.

2. That the evidence fails to show any grounds for the submission of the case to the jury on the ground of the last clear chance. It is not an issue in the case, and there is no evidence to show that the motorman in charge of the car in controversy failed to exercise ordinary care after he discovered the

plaintiff's dangerous position on the track, or near the track.

3. The evidence shows that the plaintiff himself was negligent in not using his senses in any way whatever to ascertain the approach of defendant's car; that he failed to either look or listen or otherwise inform himself as to whether a car was approaching at the time he stepped upon the track, if he did step upon the track; that, had he looked, he could have seen the car, and was guilty of contributory negligence in failing to look or listen.

Whereupon, after argument of said motion by the counsel for the respective parties, the Court overruled said motion, to which ruling the defendant excepted and exceptions were allowed by the Court. [53]

[Instructions Requested by Defendant.]

The defendant requested the Court in writing to charge the jury, among other things, as follows:

You are instructed to bring in a verdict in favor of the defendant.

#9.

You are further instructed that if the plaintiff thot he had time to cross the track of the defendant company, if he was attempting to cross the track, before the car of the defendant company would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff and he cannot recover, and your verdict must be for the defendant.

#10.

You are instructed that if the plaintiff failed to look and listen, and stop, if necessary, or to take any

reasonable precaution whatever to ascertain whether a car was coming upon the track of the defendant company, then and in that event it was negligence upon the part of the plaintiff to attempt to cross the track of the defendant company, if the car of the defendant company was in close and dangerous distance of the plaintiff.

Whereupon, after argument of the case to the jury, by the respective counsel, the Court charged the jury as follows, to wit: [54]

Instructions.

GENTLEMEN OF THE JURY:

You will, at the conclusion of the Court's instructions, retire to your jury-room to determine upon the verdict in this case and will take with you the pleadings and the exhibits in the case. These pleadings consist of the Complaint, the defendant's Answer and the plaintiff's Reply. It is your duty to resort to these pleadings in order to determine just what the parties allege against one another. Briefly, though, the Complaint charges—the Complaint of the plaintiff—that on this evening, in question, he was walking the street where he had a right to be, and that one of the defendant's cars was so negligently operated as to injure him. The defendant in its Answer says that it was not negligent and that the plaintiff was injured by reason of his own negligence in failing to use his faculties, his eyes and his ears, and to conduct himself as an ordinarily prudent and careful person would under the same circumstances; that that is the reason he was injured.

The plaintiff in his Reply denies he was negligent in the manner charged by the defendant. So you will observe each side charges the other,—the plaintiff charges the defendant [55] with negligence in the operation of its car and the defendant charges the plaintiff with negligence,—contributory negligence in his conduct and each says the other's negligence was the cause of the injury. Negligence is defined as the want of ordinary care, and ordinary care is defined as that amount of care that an ordinarily careful and prudent person would use under the same circumstances and should be proportioned to the peril or danger reasonably to be apprehended from the want of proper prudence. This is the amount of care that is required of each party in this transaction at the time of this accident.

Both the defendant and the plaintiff had a right to use the street, but each was bound to use the street with due regard to the rights of the other. On account of the fact that a street-car can only travel on fixed rails on a given line, while a pedestrian can take any part of the street he sees fit, the pedestrian is bound to take into consideration that fact in controlling his movements. If he has an opportunity, and can, in the exercise of ordinary care, get out of the way of a street-car, it is his business to do so, both on his own account, to preserve himself from injury, and to allow the street-car company to conduct its business. The motorman, and those in charge of the street-car, it is their duty to exercise that degree of care that ordinarily careful and prudent persons would exercise in the operation of a street-car to avoid injury to pedestrians who are using the street;

that is, as one of the attorneys called to your attention, and as the Court did in stating the charge in the Complaint, the plaintiff charges the defendant was negligent in the operation of its car, without particularly pointing [56] out the exact negligence upon which he relies. In plaintiff's argument, they argued to you that the car was running at too great a rate of speed, no proper lookout kept and no proper signals given. The motorman in charge of defendant's car, it was his duty to run that car, not in excess of the rate of speed, at a rate of speed at which ordinarily careful and prudent persons would have run it under the circumstances, and it was his duty to keep a lookout such as ordinarily careful and prudent persons would have kept under the same circumstances, having regard to his other duties which he was charged with performing. It was his duty to give such signals as an ordinarily careful and prudent person would have given to those he would have reason to believe were using the street, to warn them of the approach of the car in order to enable them to avoid the danger of a collision with the car.

Also, it is the duty of the plaintiff to exercise the care that an ordinarily careful and prudent person would for his own safety under the circumstances and surroundings at this time. As I have before defined to you, negligence is want of ordinary care, and ordinary care is that care that an ordinarily careful and prudent person would exercise under like circumstances, and should be proportioned to the peril and danger reasonably apprehended from a want of proper prudence.

There has been various things pointed out from the evidence in this case as regarding where foot-passengers cross the street-car line, and about some obstruction and the time of day or night it was; whether this was a street that was frequented much by pedestrians. All those, and the other circumstances that were disclosed by the evidence here, are things to be taken into consideration by you in determining [57] whether the motorman was exercising ordinary care, and you will also take into consideration all the circumstances shown by the evidence whether the plaintiff exercised ordinary care, and among these would be the fact of his crossing the street-car track, for the plaintiff was bound to make such use of his faculties, his eyes and his ears, and to conduct himself in the manner that an ordinarily careful and prudent person would before he can recover anything, even if the defendant was negligent, and the very fact that a street-car track is dangerous, and if a man does not use his faculties, his eyes and his cars, his liability to be brought into danger is one of the circumstances you are to take into consideration in determining whether he made such use of his faculties as an ordinarily careful and prudent person would at the time of the injury and prior thereto.

The plaintiff, before he can recover, must establish, first, that the defendant was guilty of negligence in the matter of which he complains, and, second, that he was injured, and third, that his injury was the proximate result of the defendant's negligence of which he complains. Unless the plaintiff can establish these allegations by a fair preponderance of the evidence, he cannot recover. Before the plaintiff

could recover in this suit, I think I have already made it plain, but I will repeat it,—before he can recover in this suit, he must not have contributed in any way to the happening of the accident by his own negligence or want of ordinary care.

The defendant, having charged the plaintiff with contributory negligence, the burden of proof, that is, the burden of establishing contributory negligence on the plaintiff's part rests upon the defendant, unless the plaintiff, has, by [58] his own evidence, shown that he was guilty of contributory negligence or want of ordinary care which contributed to his injury.

The Court will give you a number of written instructions. In so far as they may be a repetition of what the Court has already orally instructed you, you will not conclude that the Court is trying to impress those upon you as being more important than those not repeated.

"The Court instructs you that the law presumes nothing in favor of the plaintiff or his allegations in his Complaint. The burden of proof is upon him at all times to establish affirmatively his allegations of negligence against the defendant company. He must prove this by a fair preponderance of the evidence. The fact that an accident may have occurred to him and that he may have sustained an injury while crossing defendant's street-car tracks about 62d and South Yakima Avenue, in the City of Tacoma, on the day in question, raises no presumption of liability against the defendant company. Plaintiff must prove first by a fair preponderance of the evidence that the defendant company's car was

being carelessly and negligently operated on South Yakima Avenue, and if you find from the evidence on this point that the evidence for the plaintiff and the evidence for the defendant is evenly balanced in your minds, then your verdict must be for the defendant company, because the plaintiff has failed in his proof.

The plaintiff must follow this first proof with other proofs, and must likewise establish by a fair preponderance of the evidence that the injuries which he suffered were the direct and proximate result of the negligence of the defendant [59] as set forth in the Complaint, and, again, if the evidence on this point is evenly balanced both for and against the plaintiff, your verdict must be for the defendant, because the plaintiff has again failed in his proof."

"The defendant charges that this accident was the result of the carelessness and negligence of the plaintiff himself, in that while the defendant's car was being operated on South Yakima Avenue between South 64th and South 63d streets at a moderate and lawful rate of speed, plaintiff heedlessly, recklessly, carelessly and unnecessarily placed himself in a position of great danger, to wit: By walking or running across the said street in close and dangerous proximity to defendant's car, and striking and colliding with said car, and that he failed to exercise his mental faculties in any way to observe, escape or avoid the risks and dangers of his position, which were open and apparent to him, and should have been easily avoided, and that he failed to take any care or precaution whatever to provide for his personal safety.

I charge you that the rights of a street-car com-

pany and the rights of a pedestrian upon the street are mutual and concurrent, and that they must each be exercised with reference to the use of the street by the other. Neither one has the use or the monopoly of the use of the public street, but the law holds that because of the weight and character of a street-car, in that it travels on fixed rails and cannot be stopped or turned out of the way as a wagon or a pedestrian can, that it is the duty of the pedestrian to consider this fact in crossing the street. It is the pedestrian's duty, before stepping on the car track, to make reasonable use of his senses for his own safety to ascertain whether or [60] not a car is approaching, and if he does not do so, and that failure on his part contributes to his injury, he cannot recover, even though those operating the car were also negligent, or to state this proposition in another way, I instruct you that if you find that both the plaintiff and the motorman in charge of the car were negligent, and that as a result of such joint or concurrent negligence, that is the negligence of both parties concurrently contributed to the injury and an accident occurred, your verdict should be for the defendant. The law in a case of this kind does not consider the degree of negligence of the respective parties. If the defendant was guilty of negligence, and if at the same time the plaintiff's negligence also contributed to the injury, your verdict must be for the defendant, regardless of that degree or extent of the negligence of the respective parties. Where the plaintiff himself so far contributes to the accident by his own negligence or want of ordinary care and caution, that but for his own negligence or want of

ordinary care and caution on his part the accident would not have happened, the plaintiff cannot recover, and your verdict must be for the defendant."

"You are further instructed that it was the duty of the plaintiff to use his senses, his eyes and ears, to discover the proximity and passage of the car of the defendant company, and his failure to use his faculties as an ordinarily careful and prudent person would do under such circumstances, would constitute contributory negligence and would prevent any recovery by him."

"If you find from the evidence in this case that the plaintiff walked or fell into and against the side of defendant's car, then your verdict must be for the defendant." [61]

"If you find from the evidence that the plaintiff could, by the exercise of ordinary care, and after he saw the street-car, have avoided the injury to him by getting off the track before the car struck him, then, and in that event, your verdict must be for the defendant."

"You are further instructed, that if a person be seen upon the track of defendant company's electric street railway, who is apparently incapable of taking care of himself the motorman may assume that such person will leave the track before the car reaches him, and this presumption may be indulged in so long as the danger of injuring him does not become imminent and it is not necessary for a motorman to slacken the speed of the car until such danger becomes imminent," that is, if, under the circumstances, it is reasonably apparent to the motorman that the man knows the car is coming and will have

time to get out of the way, he has a right to presume that he will do so."

"The burden is upon the plaintiff to show by a fair preponderance of the evidence the nature and extent of the injuries he sustained. You are not justified in awarding him compensation for purely speculative injuries which might or might not happen. You will not allow anything by way of punitive or speculative damages."

"If you find from the evidence for the plaintiff in this case, you will confine your verdict to such an amount as will compensate him for the actual loss and damage in the case. You will not allow anything by way of punishment or exemplary damages. There should not be any idea of punishing the defendant in your minds, but simply that of compensating the plaintiff for his loss, if, as I said before, you should find from [62] the evidence that he is entitled to recover anything."

If you should find for the plaintiff and come to the assessing of his damages, you will take into consideration all that has been shown by the evidence concerning any pain or suffering he has endured, and to what extent his earning capacity may be impaired, and what, if any, employment he may have lost by reason of the injury received by colliding with the street-car company's car of which he complains.

And one of the circumstances you are entitled to consider is his probable length of life. The plaintiff has introduced in evidence certain tables that have been compiled by life insurance companies as to the probable length of time that a man will live after he has reached the age of thirty-nine years, and these

tables show he will probably live twenty-eight years; that is, the ordinary man, such as were included in their observation and from which they compiled these tables. You will not simply follow that rule to the exclusion of the other evidence in the case, but that is one of the circumstances you will be authorized to take into consideration in determining how long this man will probably live.

You will not allow him anything for future pain and suffering or future loss of employment, unless you find from the evidence that it is reasonably certain that he will continue to suffer in the future and that he will continue in the future to be impaired in his earning capacity. The law requires something more than mere probability to justify you in returning a verdict for future pain and suffering or future impairment of earning ability, and the law has laid this down as having to be shown to a reasonable certainty before you can allow such damages. [63]

The Court instructs you that wherein the burden of proof in this case is upon the plaintiff, and wherein the burden of proof is upon the defendant; that the party having the burden of proof must establish his allegations by a fair preponderance of evidence.

A fair preponderance of the evidence has been defined as the greater weight of evidence, that is that evidence which preponderates, which is of such nature, and of such persuasive nature, and so appeals to your intelligence and understanding and experience as to create and induce belief in your minds, and if there is evidence against it, or arguments produced against it, that it still is of such a character as to

create and induce belief in your minds in spite of what has been brought against it.

You are, in this case, as in every other case where questions of fact are submitted to the jury for determination, the sole and exclusive judges of every question of fact in the case, and the weight of the evidence and the credibility of the witnesses. Whether there was or whether there was not negligence on the part of the defendant company or of the plaintiff or both of them, are questions of fact to be determined by you in the light of all that the evidence has shown, tested by your judgment as practical men. In weighing the evidence and passing upon the credibility of the witnesses, you should take into consideration all that has been shown in the case, and the manner in which they have given testimony and their appearance before you, whether it inspired your confidence or whether to the contrary, it did not do so. You should take into consideration whether the witnesses have testified fairly, freely, openly and frankly, [64] just as you would expect a man to do who was trying to tell you what he knew, no more and no less, or whether they have been evasive, hesitating, held back, contradicted themselves, or whether, on the other hand, they may have been too willing or too free, and ran on to tell things not asked, and volunteered statements of testimony—what the law calls swift witnesses. Also, you will take into consideration the situation in which each witness was placed as enabling that witness to tell you the exact truth about a transaction, taking into consideration, the opportunities one witness may have had over an-

other of seeing exactly what took place. Also you will take into consideration the interest any witness may have shown to have had in the case, either by his relation to the transaction out of which the suit grew, or the manner in which he has given his testimony or his interest in the result of the case. The plaintiff and his wife, having testified in this suit for him, you will take into consideration the same rules and tests in weighing their testimony that you would to other witnesses, including their natural interest in the result of this suit.

Two forms of verdict have been prepared, one finding generally for the defendant, and one for the plaintiff with a blank in the event you should find for the plaintiff, in which you should insert the amount of damages. When you have agreed, you will notify the bailiff you have agreed and return the verdict into court.

Whereupon and before the jury retired to deliberate on their verdict, the defendant made the following exceptions to the instructions of the Court:

[Exceptions to Instructions Refused.]

Mr. OAKLEY.—Defendant excepts to the refusal of the Court to give defendant's instruction for a directed verdict.

Exception allowed. [65]

Mr. OAKLEY.—Defendant also excepts to the refusal of the Court to give defendant's requested instruction Number 9, as follows: "You are further instructed that if the plaintiff thought he had time to cross the track of the defendant company, if he was attempting to cross the track, before the car of

the defendant company would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff, and he cannot recover and your verdict must be for the defendant," for the reason that the instruction covers the law applicable to the facts and the jury were not instructed on that point.

Exception allowed defendant.

Mr. OAKLEY.—Defendant further excepts to the refusal of the Court to give defendant's requested instruction 10 as follows: "You are instructed that if the plaintiff failed to look and listen, and stop, if necessary, or to take any reasonable precaution whatever to ascertain whether a car was coming upon the track of the defendant company, then, and in that event, it was negligence on the part of the plaintiff to attempt to cross the track of the defendant company, if the car of the defendant company was in close and dangerous proximity to the plaintiff," for the reason that this instruction correctly states the law applicable to the facts in the case and the jury were not instructed on this particular phase of the evidence.

Exception allowed. [66]

Verdict.

Thereafter the jury returned into open court with a verdict in favor of the plaintiff for damages against the defendant in the sum of $4,750.00.

And thereafter and on the 17th day of Dec. 1913, the defendant filed his motion for a judgment notwithstanding the verdict, as follows:

[Motion for Judgment Notwithstanding Verdict.

Comes now the Tacoma Railway & Power Company, the defendant in the above-entitled action, and moves the Court that judgment be entered on behalf of the said defendant, notwithstanding the verdict rendered herein by the jury.

Said motion was duly argued before the Court on the 22d day of Dec. 1913, and after considering the same, the Court overruled said motion, to which ruling defendant excepted and exceptions were allowed.

And on, to wit, the 17th day of Dec. 4, 1913, defendant filed its petition for a new trial in the above-entitled action, requesting the Court to grant a new trial on the grounds in said motion set forth, and after consideration of said motion, after argument by the counsel for the respective parties hereto, said motion was on said 23d day of Dec. 1913, overruled, and denied, to which ruling defendant excepted and exceptions were allowed.

Now, therefore, in furtherance of justice and that right may be done, the defendant presents the foregoing as its Bill of Exceptions in this cause, and prays that the same may be settled, allowed, signed and certified, by the judge as provided by law and filed as a Bill of Exceptions.

J. A. SHACKLEFORD,
F. D. OAKLEY,
Attorneys for Defendant.

(Filed Jan. 9, 1914.) [67]

Defendant's Exhibit "A."

Case No. 1335. United States District Court, Western District of Washington. Remmen vs. T. R. & P. Co. Defendant's Exhibit "A."

No. 8*09.

Did you see the accident? Yes.

Where did it occur? It must have been 63d. I look for an embankment which was there & I noticed it. It was not very far from 64th.

What day and at what hour did this accident occur? December 7th, about 7 o'clock P. M.

Where were you when it occurred? If seated, where? If standing, where? 3 or 4th seat from rear of car on station side (left-hand side facing town).

Was car standing or moving at time of accident? If moving, about how fast? I judge about 12 miles.

Was the bell or gong ringing at the time? No.

Who do you consider was to blame for the accident? Motorman.

What warning was given before accident? None.

Give knowledge of damage or injury done.

How far was object from car when first seen in a position of danger? As near as I could judge 125 ft.

How far did car go before it stopped, after striking object? When I got out I noticed it was about 2 car-lengths—I do not know length of a car.

State particularly how accident occurred. We got on at Fern Hill; we were on station side of car.

My wife had one foot on when our car started; she pulled herself on & car stopped at switch just beyond station. The con*d*tor went [68] up to talk with motorman; when he came out he closed the double door, and it looked at the time as if he had been laughing. When conductor got back into car, I think we sto*pe*d at Alki switch. The doors worked open and motorman looked back into car and just as he looked back he gave one toot of whistle; nevertheless he kept looking back over his left shoulder and I could see *Reman* on track in glare of head light, it looked as i*t Reman* was standing on track & yet motorman kept looking back. I could see over motormans shoulder and as motormans head was in the way I can only judge that *Reman* was about 125 ft. away. I could not see *Reman* after that. You would have thought that *Reman* was waiting for car, as I could see his shirt front. He was facing the car. Then car hit him. Motorman then stopped. I saw him throw off the power. I did not hear *Reman* say anything. I only went about 8 or ten feet from man. When on car he looked about half *concious*. When we got to town I asked the man his name, he said *Reman*. My wife did not see *Reman* on track, but saw the motorman looking back.

(Signed) J. E. TIMMERMAN.

March 8th, '13, 6:15 P. M.

Witness:

J. W. BROWNE.

(Filed Nov. 11, 1913.) [69]

Order Settling Bill of Exceptions.

Now, on this 30th day of January, 1914, the above cause coming on for hearing on the application of the defendant to settle the Bill of Exceptions in said cause, defendant appearing by F. D. Oakley and John A. Shackleford, its attorneys, and the plaintiff appearing by Fitch, Jacobs, and Arntson, its attorneys, and it appearing to the Court that the defendant's proposed Bill of Exceptions was duly served on the attorneys for the plaintiff, within the time provided by law, and that certain amendments have been suggested thereto and that counsel for the plaintiff and counsel for the defendant have agreed as to the said amendments which should be made, and that both parties consent to the signing and settling of the same as amended, and it appearing to the Clerk that there has been filed with the Clerk of said Court a Bill of Exceptions which contains the amendments agreed upon by the parties, and that the same is in all other respects a duplicate of the proposed Bill of Exceptions filed by the defendant herein in this cause, and it appearing that the time for settling said Bill of Exceptions has not expired; and it further appearing to the Court that the said Bill of Exceptions as amended by agreement contains all the material facts occurring in the trial of said cause, together with the exceptions thereto and all the material things and matters occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said Bill of Exceptions and the Clerk of this Court is hereby ordered

and instructed to attach the same thereto;

Therefore, upon motion of John A. Shackleford [70] and F. D. Oakley, attorneys for the defendant, it is hereby

ORDERED, that said Bill of Exceptions as amended, filed on the 9th day of January, 1914, be and the same is hereby settled as a true Bill of Exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this Court who presided at the trial of said cause, as a true, full, and correct Bill of Exceptions, and the Clerk of this Court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

EDWARD E. CUSHMAN,
Judge.

(Filed January 30th, 1914.) [71]

Petition for Writ of Error.

Comes now the defendant herein, Tacoma Railway & Power Company, and says that on or about the 13th day of November, 1913, this Court entered judgment herein in favor of the plaintiff and against the defendant in the sum of $4,750, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant comes now by its

attorneys and prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals.

And the defendant further petitions this Honorable Court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United [72] States in that behalf made and provided, and also that an order be made fixing the amount of security which this defendant shall give and furnish upon said writ of error, and that the judgment heretofore rendered be superseded and stayed, pending the determination of said cause in the Honorable Circuit Court of Appeals.

J. A. SHACKLEFORD,
F. D. OAKLEY,
Attorneys for Defendant.

(Filed Apr. 16, 1914.) [73]

Order Allowing Writ of Error.

On this 16th day of April, 1914, came the defendant herein, Tacoma Railway & Power Company, by its attorneys, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error, and praying also that a transcript of the record and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for

the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises, and said defendant having duly filed an assignment of errors intended to be urged by it and the court being advised in the premises,

IT IS HEREBY ORDERED, that a writ of error be and is hereby allowed, to have reviewed, in the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the judgment entered herein, and it is further ordered that the amount of the bond on said writ of error is hereby fixed at the sum of $6,000.00, to be given by the defendant, and upon the giving of said bond, the judgment heretofore rendered will be superseded pending the hearing of said cause, in the Honorable Circuit Court of Appeals. [74]

IN WITNESS WHEREOF, the above order is granted and allowed, this 16th day of April, 1914.

EDWARD E. CUSHMAN,
Judge.

(Filed April 16, 1914.) [75]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, TACOMA RAILWAY & POWER COMPANY, a corporation, the defendant above named, as principal, and MARYLAND CASUALTY COMPANY, a corporation, organized under the laws of the State of Maryland, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the plaintiff in the above-entitled action, ELLING REMMEN, in

the sum of SIX THOUSAND DOLLARS ($6,000.00), for which sum, well and truly to be paid to said Elling Remmen, his executors, administrators, and assigns, we bind ourselves, our and each of our successors, and assigns, jointly and severally, firmly by these presents.

SEALED with our seals this 22d day of April, 1914.

THE CONDITION of this obligation is such that whereas, the above-named defendant, Tacoma Railway & Power Company, a corporation, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States for the Western District of Washington, Southern Division, and whereas, the said [76] TACOMA RAILWAY & POWER COMPANY, desires to supersede said judgment and stay the issuance of execution thereon pending the determination of said cause in the said United States Circuit Court of Appeals for the Ninth Circuit;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Tacoma Railway & Power Company, a corporation, shall prosecute said writ of error to effect, and answer all costs and damages awarded against it, if it shall fail to make good its plea, then this obligation shall be void; otherwise the Court may enter summary judgment against said Tacoma Railway & Power Company and said surety for the amount of such costs and damages awarded against said Tacoma Railway & Power Com-

pany, and this obligation to remain in full force and effect.

TACOMA RAILWAY & POWER COMPANY,
By JNO. A. SHACKLEFORD,
Its President and Attorney.
MARYLAND CASUALTY COMPANY,
By J. S. WHITEHOUSE,
Its Agent.
R. S. HOLT,
Attorney in Fact.

[Seal of Surety Co.].

Approved this 23d day of April, 1914.
EDWARD E. CUSHMAN,
Judge.

(Filed Apr. 22, 1914.) [77]

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do, in pursuance of the command of the Writ of Error within, herewith transmit and herewith certify the foregoing to be a full, true and correct transcript of the record in the case of Elling Remmen vs. Tacoma Railway & Power Company, a corporation, lately pending in this District, as required by the stipulation of counsel filed in this case.

AND I further certify that attached hereto are the original Writ of Error, original Citation, and original Exhibits of Plaintiff 1, 2, 3, and 4, and original

Exhibit "B" of Defendant.

I further certify that the cost of preparing and certifying the foregoing transcript amounting to the sum of $53.50 has been paid to me by the counsel for plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my official signature, and the seal of this Court, this 15th day of May, A. D. 1914.

[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk.

Writ of Error.

UNITED STATES OF AMERICA.

The President of the United States of America, to Elling Remmen, Defendant in Error, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, or some of you, between Tacoma Railway & Power Company, a corporation, plaintiff in error, and Elling Remmen, defendant in error, a manifest error hath happened to the damage of said plaintiff in error, as by its answer appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things pertaining thereto, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at San Fran-

cisco, California, within thirty (30) days from the date of this writ, in the said Circuit Court of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further [79] to be done, therein, to correct that error what of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, and the seal of this Court, this 4th day of May, 1914.

[Seal] FRANK L. CROSBY,
Clerk of the United States District Court, for the Western District of Washington.

By E. C. Ellington,
Deputy Clerk. [80]

(Filed May 4, 1914.) [80]

Citation.

UNITED STATES OF AMERICA.

The President of the United States of America, to Elling Remmen, Defendant in Error, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said Court; in the City of San Francisco, and State of California, within thirty days from the date of this Citation, to wit, within thirty days from May 4th, 1914, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States, Western District of Washington, Southern Division, wherein Tacoma Railway & Power Company, a corporation, is plaintiff in error, and Elling Remmen, is defendant in

error, to show cause if any there be, why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, and the seal of this Court this 4th day of May, 1914.

[Seal] EDWARD E. CUSHMAN,
Judge of the United States District Court for the Western District of Washington, Southern Division. [81]

We hereby acknowledge due and legal service of the above Citation on the therein named Elling Remmen, defendant in error, and the receipt of a true and correct copy thereof personally at Tacoma, in said District; on this 4th day of May, 1914.

FITCH, JACOBS & ARNTSON,
Attorneys for Plaintiff.

(Filed May 4, 1914.) [82]

[Endorsed]: No. 2424. United States Circuit Court of Appeals for the Ninth Circuit. Tacoma Railway & Power Company, a Corporation, Plaintiff in Error, vs. Elling Remmen, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Received and filed May 23, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.